

1824867 (Migration) [2023] AATA 1111 (21 April 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REPRESENTATIVE:	Mr Abhi M MANGUKIYA (MARN: 2117675)
CASE NUMBER:	1824867
MEMBER:	Justine Clarke
DATE:	21 April 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(1) of Schedule 2 to the Regulations • cl 820.221(1)(a) of Schedule 2 to the Regulations

Statement made on 21 April 2023 at 2:46pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – parties have pooled their financial resources and shared day-to-day financial responsibilities during the relationship – applicant did not meet criterion 3001 in Schedule 3 – compelling reasons for not applying the Schedule 3 criteria – the parties were validly married – applicant and sponsor have a child together – marriage certificate and the birth certificate provided – applicant was not the holder of a substantive visa at the time of application – there is an Australian-citizen child of the relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss, 5F, 65, 359, 360

Migration Regulations 1994, rr 1.15; Schedule 2, cls 820.211, 820.221; Schedule 3, Criteria 3001, 3003, 3004

CASES

He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

Minister for Immigration and Ethnic Affairs v Pochi (1980) 4 ALD 139

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made on 14 August 2018 by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. On 27 June 2017, the applicant, who is a national of India, applied for the visa based on his relationship with his sponsor, [Ms A]. At the time of application, the applicant was aged [age] years and the sponsor was aged [age] years. At the time of this decision, the applicant is aged [age] years and the sponsor is aged [age] years.
3. At the time of application, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. The primary criteria include cl 820.211.
4. The applicant provided the Tribunal with a copy of the delegate's refusal decision (the primary decision). The delegate assessed the application pursuant to cl 820.211(2), finding it to be the only subclause relevant to the applicant's circumstances. The delegate refused the visa on two bases.
5. First, the delegate found that the information and evidence that had been submitted in support of the application was not sufficient to demonstrate that, at the time of application on 27 June 2017, the applicant satisfied the definition of spouse under s 5F of the Act. The delegate noted that, on 8 August 2017, the applicant had been provided with the opportunity to submit further evidence of the claimed partner relationship but had not done so. In the circumstances, the delegate found that the applicant did not meet cl 820.211(2)(a).
6. Secondly, the delegate considered the information and evidence relating to the applicant's immigration history and found that the applicant did not meet criterion 3001 in Schedule 3. The delegate noted that, on 8 August 2017, the applicant had been provided with the opportunity to submit information regarding any compelling reasons. However, no response was received so the delegate found 'there are no compelling reasons before me to waive the Schedule 3 requirement'. The delegate stated:
 7. I have considered all of the circumstances relevant to your application and conclude, for the following reasons, that they are not compelling.
 8. I have given significant weight to your immigration history, namely your history of lodging unmeritorious applications and subsequent reviews of these decisions, and your failure to depart Australia after being granted several bridging visa E's on this basis. I consider that, in addition to the circumstances stated in the policy above, it is not the intention of the Schedule 3 waiver to facilitate persons who have chosen to prolong their stay in Australia while awaiting the circumstances which would allow them to make a visa application onshore.
9. Accordingly, the delegate found that the applicant did not meet cl 820.211(2)(d), because cl 820.211(2)(d)(ii) was not met.
10. On 27 August 2018, the applicant applied to the Tribunal for review of the delegate's refusal decision. The applicant was represented in relation to the review. The Tribunal notes that,

during the review, the representative changed. The initial representative had their registration with the Office of the Migration Agents Registration Authority suspended.

11. On 12 July 2022, pursuant to s 359(2), the Tribunal invited the applicant to provide further information in support of the claims that he and his partner are in a spouse or de facto relationship and any compelling reasons for not applying the Schedule 3 criteria. The Tribunal requested the information be provided by 26 July 2022.
12. On 25 July 2022, the applicant requested an extension of time in which to submit the requested information. The applicant gave reasons for his request, including that he had recently appointed a new migration agent, the former agent having had his licence suspended (evidence of which is on the Tribunal's file). The applicant claimed that he had been misguided by the previous agent.
13. On 26 July 2022, the Tribunal wrote to the applicant, by way of his new representative, to inform that it had granted an extension of time until 9 August 2022.
14. On 9 August 2022, the applicant filed further evidence in support of the case, including importantly a registered birth certificate for the claimed child of the relationship, born on a specified date in 2020. Both the applicant and the sponsor are listed as the child's parents.
15. On 9 September 2022, 20 September 2022 and 7 December 2022, the applicant filed further evidence in support of his case.
16. On 14 April 2023, pursuant to telephone outreach by an officer of the Tribunal, the representative informed that there had been no material change to the parties' relationship since the applicant filed the evidence in 2022.
17. On 21 April 2023, in response to the Tribunal's correspondence dated 14 April 2023, the applicant submitted Form 40SP completed by the sponsor as well as a copy of the sponsor's registered birth certificate.
18. Having reviewed all the evidence in this case and pursuant to s 360(2)(a) of the Act, the Tribunal considers that a hearing is not required, and that the Tribunal should decide the review in the applicant's favour based on the material before it.
19. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The primary criteria to be satisfied at the time of application are that the applicant is not the holder of a Subclass 771 (Transit) visa and that he meets one of the alternate requirements set out in cl 820.211(2), (5), (6), (7), (8) or (9): cl.820.211(1). With respect to the first requirement, the Tribunal has reviewed the applicant's movement records which also detail his visa status at various times. The Tribunal is satisfied that the applicant was not the holder of a Subclass 771 (Transit) visa at the time of application. Therefore, the Tribunal finds that cl 820.211(1)(a) is met. With respect to the second requirement, the subclause relevant to the applicant's circumstances is cl 820.211(2).
21. In this review, there are two issues for determination. First, whether, at the time of application, the applicant was the sponsor's spouse (for the purposes of cl 820.211(2)) and whether there are compelling reasons to waive the Schedule 3 criteria (for the purposes of cl 820.211(2)(d)(ii)).

22. With respect to the first issue, the Tribunal notes Middleton J's statement in *Jayasinghe v MIMA* [2006] FCA 1700 at [35], that:

23. Evidence of events subsequent to the visa application is relevant if it 'tends logically to show the existence or non-existence of facts relevant to the issue to be determined': see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160 per Deane J. The Tribunal must consider all relevant evidence, which may include evidence of events subsequent to the date of application insofar as it assists in the task of determining whether the appellant and the sponsor were in a marriage relationship at the time of the application. The question of whether particular evidence is relevant and the weight it is to be given is clearly a matter for the Tribunal.

24. In deciding the first issue for determination in this matter, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application.
25. The Tribunal considers that, in this case, it is appropriate to also make findings about the time of decision criteria—cl 820.221.

Whether the parties are in a spouse or de facto relationship

26. Clauses 820.211(2)(a) and cl 820.221 require that, at the time the visa application was made and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.
27. The applicant claims to be the spouse of the sponsor who is an Australian-born citizen. The Department's file contains a certified copy of the bio-pages of the sponsor's Australian passport. The Tribunal is satisfied that the sponsor is an Australian citizen.
28. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)–(d).
29. In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision.
30. Each specific matter contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

31. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant and the sponsor were married in [location], Victoria on [date] May 2017. A copy of the parties' 'decorative' Certificate of Marriage is on the Department's file and a copy of the registered marriage certificate is on the Tribunal's file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

32. *The financial aspects of the relationship*

33. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are matters to consider when assessing the financial aspects of the relationship.
34. There is no evidence before the Tribunal that, at the time of application or at the time of this decision or at any intervening time, the applicant and the sponsor have:
- jointly owned real estate;
 - had any joint liabilities; and
 - owed any legal obligation in respect of the other.
35. In this review, the applicant provided a transaction listing, dated 5 September 2022, from an Australian bank showing transactions from the parties' joint bank account for the period from 11 July 2022 to 5 September 2022. The Tribunal gives some weight to the evidence that the parties have a joint bank account which they use regularly.
36. With respect to the extent of any pooling of financial resources, in the applicant's application for the visa, he declared, '[t]here are some incidents where [Ms A] supports me and I support her in financial aspects'. The applicant did not detail what he meant by this statement.
37. In the applicant's signed statement of 3 August 2022, which the Tribunal notes was witnessed by a named officer at a named police station, he stated, 'I can confirm that I am the only person working in my family now and I am providing for my family by working two jobs simultaneously'. He continued, '[a]s the head of family, I believe it is my responsibility to take care of the financial needs of my family'. In the sponsor's signed statement of 3 August 2022, which the Tribunal notes was also witnessed by a named officer at a named police station, she stated, 'my husband is the only working person in our family and he is providing for us by working very hard'. She continued, 'I am very much concerned what will happen to our financial situation should he have to leave the country'.
38. The applicant submitted many payslips from his employment in support of his claims. The Tribunal notes that one of these jobs is for [Company 1]. The transaction listing shows that the applicant's pay from [Company 1] is deposited into the joint bank account. The transaction listing also shows that payments from Centrelink are deposited into the account. On the evidence, the Tribunal finds that, at the time of this decision, the applicant and the sponsor pool their financial resources.
39. With respect to any sharing of day-to-day household expenses, in the applicant's application for the visa, he declared, '[w]e share all expenses incurred in our relationship'. He elaborated, explaining, '[e]lectricity and Gas Bills, Water Bills, Grocery and other essential expenses are shared between us'. When the matter was before the delegate, the applicant had submitted a copy of one water bill, addressed to both parties at the claimed marital home in a south-eastern suburb of Melbourne. This bill is dated [date] May 2017, which was the day before the parties married. In the primary decision, the delegate gave no weight to this evidence. The Tribunal takes a different view to the primary decision maker. The Tribunal gives some weight to this evidence. In this review, the Tribunal notes the applicant's submission that he had been misguided by his previous migration agent.

40. In this review, the applicant submitted:
- an electricity bill in his name alone, addressed to the claimed marital home, dated 17 March 2022;
 - two gas bills in his name alone, addressed to the claimed marital home, dated 6 October 2020 and 14 June 2022;
 - an internet bill in the sponsor's name alone, addressed to the claimed marital home, dated 24 January 2022; and
 - the earlier mentioned transaction listing from the joint bank account.
41. The Tribunal has reviewed the transaction listing in detail and notes that the parties have paid for a number of day-to-day household expenses from this account, including for the internet, other utilities, supermarket and pharmacy items. On the evidence, the Tribunal accepts the applicant's claim that the parties have shared their day-to-day household expenses throughout their relationship. The Tribunal gives weight to this evidence and finding.
42. Based on the evidence before it (which the Tribunal accepts), the Tribunal finds that the applicant and the sponsor jointly own a bank account; have pooled their financial resources in their joint bank account and have shared their day-to-day household expenses. The Tribunal gives weight to the evidence of the financial aspects of the parties' relationship. In the Tribunal's view, this evidence points towards the parties being in a spousal relationship at all relevant times.
43. *The nature of the household*
44. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.
45. As noted earlier, in this review, the applicant has filed documentary and photographic evidence that he and the sponsor have a young child. This evidence was not before the delegate. Based on the evidence, the Tribunal is satisfied that there is a child of the relationship.
46. While the Tribunal has not had the benefit of oral evidence about the care and support arrangements for the child of the relationship, it seems clear from the evidence that both the applicant and the sponsor are jointly responsible for the care and support of the child. For example, the Tribunal notes the statements by both the applicant and the sponsor in their signed statements of 3 August 2022. The applicant specifically referred to his son's financial needs and the sponsor expressed her concern about the psychological impact on her son if the applicant was required to depart Australia. The Tribunal also notes the photographs of the child with his parents.
47. Based on the evidence, the Tribunal finds and gives great weight to the evidence that the applicant and the sponsor have a young child for whose care and support they are jointly responsible.
48. With respect to the living arrangements of the persons, the Tribunal notes that, in the applicant's application for the visa, he declared that both he and the sponsor were living at a property in a south-eastern suburb of Melbourne. He provided some evidence to the Department in support of this claim, being a letter addressed to both the applicant and the

sponsor at the property from a real estate agent. The letter was dated 13 September 2016 and concerned an upcoming rental inspection. In the primary decision, the delegate gave no weight to this evidence. The Tribunal takes a different view to the primary decision maker. The Tribunal gives some weight to this evidence.

49. In this review, the applicant has provided further documentary evidence in support of his claim that he and the sponsor continue to reside at this address. In addition to the documentary evidence detailed in the section on the financial aspects of the relationship, the applicant submitted a copy of the signed residential tenancy agreement for the claimed marital property and an extract from the real estate agent's system, titled 'Renter History'. The residential tenancy agreement is dated 30 September 2019, notes a rental increase commencing on 2 October 2019, and is in both parties' names for a period of 12 months. The Tribunal gives great weight to this evidence. The 'Renter History' document details the payment of rent for the claimed marital home from 20 July 2020 to 19 July 2022. The Tribunal gives great weight to this evidence.
50. Based on all the evidence before the Tribunal, the Tribunal finds and gives great weight to the evidence that the applicant and the sponsor have lived together as claimed.
51. With respect to any sharing of the responsibility for housework, the Tribunal notes that in his application for the visa, the applicant declared:
 52. [Ms A] does most of the household activities such as Cooking, Washing Dishes, Cleaning, Dusting and etc. where I support her too. [Ms A] supports me when it comes to Gardening and other major household activities. We share household activities and we enjoy engage in them.
53. As is the case in many partner cases that come before the Tribunal, there is no photographic or third-party evidence to corroborate the applicant's claim about the sharing of the housework. Notwithstanding, the Tribunal has no reason to doubt the veracity of the applicant's declaratory evidence. The Tribunal accepts the applicant's evidence.
54. The Tribunal gives great weight to the evidence of the nature of the household. In the Tribunal's view, this evidence is strongly suggestive of the parties being in a spousal relationship at all relevant times.
55. *The social aspects of the relationship*
56. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are matters to be considered in determining the social aspects of the relationship.
57. With respect to whether the persons represent themselves to other people as being married to each other, in the primary decision, the delegate noted that the applicant had provided two photographs from the wedding ceremony and acknowledged Ms [B]'s (the sponsor's mother) Form 888 statutory declaration that she was aware of the marriage but expressed concern that 'you and your sponsor have not provided evidence of a wedding ceremony attended by family and friends'.
58. The Tribunal notes that there is no requirement that a wedding ceremony be witnessed by family and friends. Further, the Tribunal notes that there was evidence before the delegate that a friend had attended the wedding ceremony. In his Form 888 statutory declaration of 10 June 2017, Mr [C] (the applicant's friend) declared that he had attended the wedding

ceremony. Accordingly, the Tribunal takes a different view to the delegate of the evidence that was before the delegate.

59. The Tribunal notes that [Ms B]'s declaration that was before the delegate, and her signed statement of 3 August 2022 which was filed in this review, clearly evidence that [Ms B] was aware of and supported the parties' marriage. The Tribunal gives great weight to this evidence.
60. The Tribunal also notes that, in this review, the applicant submitted a signed 'to whom it may concern' letter, dated 19 July 2022, from a named medical practitioner which evidences that the applicant's treating medical practitioner was aware of the partner relationship between the applicant and the sponsor, and the existence of their child. The Tribunal gives some weight to this evidence.
61. In addition, the Tribunal notes that the copy of the parties' registered marriage certificate which was filed in this review states that there were two witnesses to the marriage, being [names deleted]. If the Tribunal had held a hearing in this matter, it is likely that the applicant could have given oral evidence about his relationship (friendship or otherwise) with these people. The Tribunal considers it likely that these witnesses were friends.
62. In view of the evidence before the Tribunal, the Tribunal finds that, at all relevant times, the persons had and have represented themselves to other people as being married to each other.
63. With respect to the opinion of the persons' friends and acquaintances about the nature of the relationship, the Tribunal notes that, when the matter had been before the delegate, the applicant submitted the following declarations in support of the relationship:
 - Form 888 statutory declaration made by Ms [B] (the sponsor's mother) on 8 June 2017 (together with a certified copy of the bio-pages of her Australian passport); and
 - Form 888 statutory declaration made by Mr [C] (the applicant's friend) on 10 June 2017 (together with a certified copy of the bio-pages of his Australian passport).
64. The delegate gave these declarations little weight because the applicant and the sponsor had 'provided limited evidence to support the claims made in these declarations'. Again, the Tribunal takes a different view to the delegate. Both declarants outlined how they know the parties, their contact with the parties and their reasons for viewing the relationship as a genuine and continuing one. The Tribunal gives great weight to these declarations.
65. The Tribunal also notes and gives weight to [Ms B]'s signed statement made on 3 August 2022 which was witnessed by a named officer at a named police station. Amongst other things, she stated, '[m]y daughter and [the applicant] are in a genuine continuing relationship since more than 5 years now and my grandchild is also born out of this relationship'.
66. With respect to any basis on which the persons plan and undertake joint social activities, the Tribunal notes that the applicant submitted a number of photographs to the Department of him and the sponsor together, sometimes with others and sometimes just the two of them. With respect to the group photographs, the Tribunal notes that the delegate acknowledged that these photographs indicate that the parties have undertaken some joint social activities and have met each other's friends and families. Notwithstanding, the delegate found that the photographs did not constitute convincing evidence of a committed spouse relationship. The Tribunal agrees with the delegate that these group photographs—as well as the photographs of the parties out alone at places such as a beach and the Eureka Tower viewing platform—indicate that the parties have planned and undertaken a number of joint social activities,

including with friends and family. However, the Tribunal takes a different view to the delegate of the weight to be given to this evidence. In the Tribunal's view, this evidence points towards the parties being in a committed spousal relationship and should be given some weight.

- 67. In this review, the applicant submitted further photographs of the parties together with their son, including at a child's birthday party, on trips to the coast, a river and a Westfield shopping centre for a photograph with Santa. The applicant also submitted a flight itinerary for both parties to fly from the Gold Coast to Melbourne in early April 2018. The Tribunal accepts and gives weight to all this evidence.
- 68. The Tribunal gives weight to the evidence of the social aspects of the parties' relationship. In the Tribunal's view, this evidence is suggestive of the parties having been in a spousal relationship at all relevant times.

69. *The nature of the persons' commitment to each other*

- 70. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are matters to be considered in determining the nature of the persons' commitment to each other.
- 71. The Tribunal notes that, in the applicant's application for the visa, he details the claimed inception and development of the parties' relationship. He claims that they met online before developing a friendship over the phone and then meeting in person on 24 April 2016. As noted earlier, the parties married on [date] May 2017 and, one month later, on 27 June 2017, the applicant applied for the visa. Although the applicant met the sponsor at a time when he was an unlawful non-citizen, the Tribunal has no reason to doubt the veracity of the applicant's claims about the inception and development of the relationship. Accordingly, the Tribunal gives weight to the evidence that, at the time of application on 27 June 2017, the applicant and the sponsor had been married for a month and that, at the time of this decision, they have been married for almost six years.
- 72. The Tribunal also accepts the applicant's claims, supported by the earlier mentioned evidence, that they have been living together for over six years.
- 73. With respect to the degree of companionship and emotional support that the persons draw from each other, the Tribunal notes the applicant's statement in his application for the visa that

74. We are good friends in our relationship which helps us a lot to stabilise our kinship. [Ms A] helps me in most of my hard situations being my best friend and my beloved wife.

- 75. He also declared, '[w]e have been through thick and thin where we have always been by each other's side during the most difficult times passed by'.
- 76. In the sponsor's signed statement of 3 August 2022, she outlined her fears for herself and her child if the applicant were required to depart Australia.
- 77. While there is limited corroborating evidence from third parties, the Tribunal has no reason to doubt the veracity of either the applicant's or the sponsor's evidence.
- 78. Based on all the evidence, the Tribunal finds that the applicant and the sponsor enjoy their companionship and draw emotional support from each other.

79. With respect to whether the persons see their relationship as long-term, the Tribunal notes that, at the time of application, the applicant declared that the parties were 'planning a family of our own'. As discussed, at the time of this decision, they have a child together. The progression of their relationship from partners to parents causes the Tribunal to find that, at all relevant times, both the applicant and the sponsor have viewed their relationship as being for the long term.
80. The Tribunal has considered the parties' respective ages, backgrounds and life experiences, and finds that, at the time of application and at the time of this decision and at all intervening points, neither party was in a relationship with any third party.
81. The Tribunal places great weight on the evidence of the nature of the persons' commitment to each other at all relevant times. The Tribunal considers that this evidence is strongly suggestive of the parties being in a spousal relationship at all relevant times.

82. *Other matters*

83. The Tribunal notes that the delegate's refusal decision states the following.

84. The Department conducted checks with the Department of Human Services, the following information from Centrelink that does not support your application, was provided to the Department:

- During the period you have claimed to have been in a spousal relationship with your sponsor she has been a customer with Centrelink;
- Your sponsor has updated her personal details with Centrelink during this period;
- Your sponsor's marital status is listed as 'single' with Centrelink, with no information to suggest that she has identified you as her partner to Centrelink.

85. On 27 July 2018 you advanced the following information:

- You and your sponsor visited the Centrelink [office] on 16 July 2017 to get your Medicare card and to update your sponsor's marital status. You claim that you both informed the officer that you are legally married and provided your marriage certificate as evidence. You were then informed by the officer that the marital status of your sponsor was recorded on their system as 'Married'.
- After receiving the natural justice letter [of 29 June 2018] you visited the Centrelink office one more time on 9 July 2018 at [time] to clarify the problem. You claim the officer [Ms D] confirmed that the marital status of your sponsor was not updated and that it was still showing as 'never married'. [Ms D] advised you that your sponsor was not receiving benefits from Centrelink and therefore it was not required to update her marital status. You were then instructed to fill a 'Changes in circumstances form' and that her status was now showing as 'Married'.

86. Centrelink records indicate that your sponsor was receiving Newstart Allowance from 7 June 2016 until 4 December 2017, therefore I do not accept your claims that you were advised that your sponsor did not need to update her marital records as she was not receiving payments because at the time you married she continued to receive payments. I find the explanation provided in response to this

adverse information unconvincing, and I consider it raises significant concerns about the genuineness of the spousal relationship between you and your sponsor.

87. The Tribunal has reviewed the sponsor's Centrelink records which are on the Department's file. The records evidence that, as at 27 June 2018 (the date of the records), the applicant's marital status was recorded as 'single'. The sponsor's residential and postal address was listed as the address of the marital home in the south-eastern suburb of Melbourne. The 'start date' for the sponsor living at this address is listed as '20/09/2016'. The records evidence that the sponsor was receiving Newstart Allowance from 7 June 2016 until 4 December 2017.
88. The Tribunal has also reviewed the written response provided by the applicant's former representative to the Department's correspondence about the Centrelink records. This document broadly aligns with the delegate's restatement.
89. The Tribunal understands the evidence as follows. The applicant claims that, as at 16 July 2017—a period in which the sponsor was receiving Newstart Allowance—he and the sponsor had attended Centrelink to update the sponsor's marital status (and for the applicant to obtain a Medicare card). In essence, the applicant's claim is that he and the sponsor did not know that the sponsor's Centrelink records still recorded her as being 'single' until after the applicant received the Department's letter of 29 June 2018. After this date, on 9 July 2018—a period in which the sponsor was *not* receiving Centrelink payments—the applicant attended Centrelink, was informed that the sponsor's status was listed as 'single' and was informed that 'since his wife is not receiving any benefits from Centrelink it is not required to update the marital status'.
90. The delegate did not accept the applicant's claim that he was advised by Centrelink that the sponsor did not need to update her marital status because at the time of the marriage she continued to receive payments. The Tribunal suspects that the delegate may have misunderstood the applicant's claims. The Tribunal understands the applicant's claims to be as outlined in the paragraph above. The Tribunal finds the applicant's explanation to be plausible. The Tribunal has no reason to believe that the sponsor did not change her marital status with Centrelink for bad reasons. To the contrary, the records evidence that, earlier, the sponsor had updated her residential and postal address with Centrelink. The records suggest that it was on 20 September 2016—over eight months prior to the marriage—that the sponsor updated her address to the address of the marital home in the south-eastern suburb of Melbourne. This suggests that the sponsor complied with her obligations to inform Centrelink of relevant changes to her circumstances.
91. The Tribunal finds that the sponsor's Centrelink records as at 27 June 2018 and the applicant's response to the Department's natural justice letter of 29 June 2018 are not the reason, or a part of the reason, to affirm the decision under review.

92. Conclusion on spouse requirements

93. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s 5F(2)(a) of the Act.
94. After considering all the evidence before it and for the reasons given with respect to the reg 1.15A(3) matters, the Tribunal is satisfied that, both at the time of application on 27 June 2017 and at the time of this decision, the applicant and the sponsor:
 - had and have a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s 5F(2)(b) of the Act;

- had and have a genuine and continuing relationship, as required by s 5F(2)(c) of the Act; and
 - lived and live together as required by s 5F(2)(d)(i) of the Act.
95. Given these findings, the Tribunal is satisfied that, at the time the visa application was made and at the time of this decision, the parties were and are in a spousal relationship.
96. However, the spouse requirement in cl 820.211(2)(a)(i) is not the only requirement in cl 820.211(2) which must be satisfied at the time of application. The sponsorship requirements in cl 820.211(2)(a)(ii) and cl 820.211(2)(c) must also be satisfied, and, if the applicant was not the holder of a substantive visa at the time of application, then the requirements in cl 820.211(2)(d) must also be satisfied.
97. The Department's file does not contain a copy of a completed *Form 40SP—Sponsorship for a partner to migrate to Australia*. As noted earlier, on 14 April 2021, the Tribunal wrote to the applicant, by way of the representative, to seek to remedy this deficiency. The Tribunal requested a copy of the completed sponsorship form (filled out now) and/or a statement from the sponsor where she refers to the sponsorship undertakings in reg 1.20(2)(c) such that the Tribunal is in a position to make findings about the sponsor's intention at the time of application on 27 June 2017. The Tribunal has reviewed the completed Form 40SP which was submitted on 21 April 2023. Based on this documentary evidence, the Tribunal is satisfied that the applicant is sponsored by the sponsor and that cl 820.211(2)(c)(i) is met.
98. There is no information before the Tribunal to suggest that the circumstances outlined in cl 820.211(2B) apply so the Tribunal finds that the sponsor is not prohibited by that subclause from being a sponsoring partner. Accordingly, the Tribunal finds that cl 820.211(2)(a)(ii) is met.
99. The applicant's movement records evidence him as having held a Bridging E visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 27 June 2017. A bridging visa is specifically excluded from the definition of 'substantive visa' in s 5 of the Act. As the applicant did not hold a substantive visa at the time of application, the further requirements in cl 820.211(2)(d) must be met.

Does the applicant meet Schedule 3 criteria, or are there compelling reasons for not applying those criteria?

100. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl 820.211(2)(d).
101. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

102. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.

103. The relevant day in this case is the day the applicant last held a substantive visa. The Tribunal notes that the applicant's Visitor (Class FA) Subclass 600 visa ceased on 22 June 2013. The current application for the Partner visa was lodged on 27 June 2017.
104. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

105. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
106. The expression 'compelling reasons' is not defined for these purposes. However, reasons that are compelling should 'force or drive the decision-maker' 'irresistibly' to some end: *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [31]. The reasons or circumstances should be sufficiently powerful to lead a decision-maker to find that the criteria should not be applied: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
107. The Tribunal notes that the Explanatory Statement to Statutory Rules 1996, No 75 which accompanied the introduction of the provisions gave two examples of circumstances in which a waiver may be justified. One of these examples is that there are Australian-citizen children from the relationship. The other is that the applicant and sponsor are already in a long-standing partner relationship which has been in existence for two years or longer.
108. The Tribunal is mindful that it is obliged to consider all the circumstances of the case and determine, on the evidence as a whole, whether there are compelling reasons for not applying the Schedule 3 criteria.

109. Australian-citizen child of the relationship

110. As noted earlier, the applicant has submitted evidence that there is a young child of the relationship. This evidence includes a copy of the child's registered birth certificate which details the applicant as the father of the child and the sponsor as the mother of the child. The applicant also submitted several photographs of him and the sponsor with the child.
111. From the evidence before it, the Tribunal is satisfied that there is an Australian-citizen child of the relationship. At the time of this decision, that child is almost [age] years of age.
112. The Tribunal finds that there is a young Australian-citizen child of the relationship, and that this fact is a compelling reason to waive the Schedule 3 criteria.

113. *The partner relationship is long-standing and the sponsor's and the child's dependence on the applicant and the potential for their psychological and financial hardship if the applicant were required to depart Australia*

114. As detailed in the first part of these reasons for decision, the Tribunal has found that, at the time of this decision, the parties have been in a committed, exclusive spousal relationship for almost six years. The Tribunal considers that the evidence of the length of the parties' spousal relationship, in conjunction with the evidence that there is an Australian-citizen child of the relationship, constitute compelling reasons to waive the Schedule 3 criteria.

115. The Tribunal also accepts the submissions (of 8 August 2022) and the statements made by the applicant, the sponsor and [Ms B] (all on 3 August 2022) that the sponsor and the child are emotionally and financially dependent on the applicant to a substantial degree and that, if the applicant was required to depart Australia, there is the potential for their psychological and financial hardship. In the circumstances of this case, the Tribunal finds that this is another compelling reason to waive the Schedule 3 criteria.

116. *The applicant's unlawfulness*

117. The primary decision outlines the applicant's immigration history. The applicant has not sought to correct any of the information that was detailed in that decision.

118. As noted earlier, the applicant has claimed that he was misguided by his previous migration agent—an agent whose registration was subsequently suspended. In the applicant's signed statement of 3 August 2022, he stated that he had been misguided in two ways. First, the applicant claimed that the previous agent had 'not acted in a timely manner', leading to the applicant's 'troubled visa situation'. Secondly, the applicant claimed that the previous agent had misguided him 'by lodging applications that had no prospect of success'.

119. In the current representative's written submissions of 8 August 2022, it was submitted:

120. Misguided by a Registered Migration Agent – My client came to Australia in May 2013 on a Tourist visa. My client liked the quality provided by the Australian education system and wanted to study in Australia to gain skills that could get him steady employment. Unfortunately, the student visa application was refused, and my client applied for a review of the decision and the decision was affirmed in January 2014.

121. My client was very young when he came to Australia and did not have proper knowledge of the migration regulations and migration law. My client did not understand the consequences of being unlawful in Australia and remained unlawful from 2014 to 2016 as he thought that he can stay in Australia for limited periods based on humanitarian reasons.

122. My client intended to leave the country once he came to know that he does not have any options of staying further in Australia on a valid visa. However, he was misguided about his further visa options and was encouraged to lodge a Protection visa in May 2016. My client wishes to confirm that he would not have opted to lodge the Protection visa had he known that he was not eligible for that visa. My [client] later came to know about the true legislative meaning of Protection visa. By then, he had already fallen in love with an Australian citizen and got married in May 2017.

123. The main reason for the history of non-compliance was that the client was not provided the proper guidance in relation to the partner visa application as well as

other previous visa application. This was also the main reason the client became unlawful in Australia.

124. The Tribunal has had regard to the Department's policy, which focuses on the circumstances that resulted in the applicant becoming unlawful and emphasises the consideration of whether the circumstances are beyond the applicant's control. The Tribunal does not consider it necessary to make findings as to whether the circumstances that resulted in the applicant becoming unlawful were beyond the applicant's control. Rather, the Tribunal considers that it is appropriate that the Tribunal note that it regards the applicant's previous unlawfulness, for a period of over two years, to be a very serious matter. Notwithstanding this remark, in this case, the Tribunal gives greater weight to the fact that there is an Australian-citizen young child of the relationship than it does to the applicant's previous unlawfulness. The applicant's previous unlawfulness is not the reason, or part of the reason, for affirming the decision under review.

125. *Conclusion on whether there are compelling reasons*

126. Considering the circumstances as a whole, the Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).

127. **CONCLUSION**

128. In conclusion, the Tribunal is satisfied that, at the time of application, the applicant met all the requirements of cl 820.211(2). Accordingly, the applicant meets cl 820.221(1).
129. As stated earlier, the Tribunal is also satisfied that, at the time of this decision, the applicant continues to meet the requirements of cl 820.211(2)(a)(i). Further, the Tribunal considers that the applicant continues to meet the other requirements of cl 820.211(2)—being paragraphs (a)(ii), (c) and (d)—at the time of this decision. Accordingly, the applicant continues to meet the requirements of cl 820.211(2) and thus meets cl 820.221(1)(a).
130. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

131. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(1) of Schedule 2 to the Regulations
 - cl 820.221(1)(a) of Schedule 2 to the Regulations

Justine Clarke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.